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In the Supreme Court of the United States

CHEROKEE NATION OF OKLAHOMA AND SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450-450n, authorizes the Secretary of the Interior and the Secretary of Health and Human Services to enter into self-determination contracts with Indian Tribes for the administration of programs that the Secretaries otherwise would administer themselves. The ISDA also provides that the Secretaries shall pay "contract support costs" to cover certain direct and indirect expenses incurred by the Tribes in administering those contracts. The ISDA, however, makes payment on the contracts "subject to the availability of appropriations," and declares that the Secretary "is not required to reduce funding for programs, projects or activities serving a tribe to make funds available" for contract support and other self-determination contract costs. 25 U.S.C. 450j-1(b). The questions presented are:

1. Whether petitioners are entitled to full funding of the contract support costs associated with carrying out self-determination contracts with the Indian Health Service, where appropriations were insufficient to fully fund those costs.

2. Whether Section 314 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277, 112 Stat. 2681-288, bars petitioners from recovering their contract support costs.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 311 F.3d 1054. The opinion of the district court (Pet. App. 24a-50a) is reported at 190 F. Supp. 2d 1248. An earlier ruling by the district court denying class certification is reported at 199 F.R.D. 357.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 2002. A petition for rehearing was denied on January 22, 2003 (Pet. App. 51a-52a). The

petition for a writ of certiorari was filed on April 3, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450-450n, was enacted in 1975 to ensure "effective and meaningful participation by the Indian people in the planning, conduct, and administration" of federal services and programs provided to the Tribes and their members. 25 U.S.C. 450a(b). Toward that end, the ISDA provides that, at the request of a Tribe, the Secretary of Health and Human Services (the Secretary) must enter into a "self-determination contract" with "a tribal organization," under which the tribal organization will "plan, conduct, and administer programs" previously administered by the Secretary for the benefit of the Indians; ISDA self-determination contracts, however, are not considered procurement contracts. 25 U.S.C. 450f(a)(1).[1] The Secretary has delegated his authority to enter into self-determination contracts to the Indian Health Service (IHS), the component of the Department of Health and Human Services responsible for providing primary health care for American Indians and Alaska Natives throughout the United States, 25 U.S.C. 13, 1601; 42 U.S.C. 2001.

The ISDA requires the Secretary to provide funding under self-determination contracts equal to the amount of funds the Secretary otherwise would have expended if the programs were operated by IHS. 25 U.S.C. 450j-

[1] The Act defines "Secretary" to mean either the Secretary of the Interior, or the Secretary of Health and Human Services, or both. 25 U.S.C. 450b(i). This case involves only contracts between the Tribes and the Secretary of Health and Human Services.

1(a)(1). In addition, the ISDA directs the Secretary to fund direct and indirect costs known as "contract support costs" or "CSCs" to cover certain administrative expenses that would not have been incurred by the Secretary if IHS operated the programs itself. 25 U.S.C. 450j-1(a)(2). The Secretary's obligation to fund self-determination contracts is limited, however, by a succeeding provision of the ISDA. That provision makes payments under self-determination contracts "subject to the availability of appropriations," and declares that the Secretary "is not required to reduce funding for programs, projects or activities serving a tribe to make funds available" for self-determination contracts. 25 U.S.C. 450j-1(b).

Each self-determination contract under the ISDA must contain or incorporate by reference the provisions of a statutory model agreement. 25 U.S.C. 450*l*(a). One mandatory provision of the model agreement states that "*[s]ubject to the availability of appropriations*, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement" negotiated by the parties. 25 U.S.C. 450*l*(c) (emphasis added) (Model Agreement § 1, ¶ (b)(4)).

Congress enacted a further limit on spending for contract support costs under the ISDA in 1998. In earlier years, the committee reports accompanying annual appropriations had "earmarked" certain sums for contract support costs. See, *e.g.*, S. Rep. No. 319, 104th Cong., 2d Sess. 90 (1996); H.R. Rep. No. 173, 104th Cong., 1st Sess. 97 (1995); pp. 4-5, *infra* (discussing specific sums earmarked). Section 314 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999 Pub. L. No. 105-277, Tit. II, § 314, 112 Stat. 2681-288 (Section 314), provided that, "[n]otwithstanding any other provision of law," the amounts "earmarked" for

contract support costs in those committee reports "are the total amounts available for fiscal years 1994 through 1998 for such purposes."

2. The dispute in this case concerns shortfalls in funding for contract support costs associated with self-determination contracts. Petitioner Shoshone-Paiute Tribes of the Duck Valley Reservation (Shoshone) claims a right to contract support costs associated with the operation of certain ongoing and newly-contracted Indian health care programs for fiscal years 1996 and 1997, and petitioner Cherokee Nation of Oklahoma (Cherokee) claims a right to payment for such costs for fiscal year 1997.

a. For fiscal year 1996, the House Committee on Appropriations recommended that approximately $1.7 billion be appropriated to IHS, with $153 million to be spent on contract support costs for self-determination contracts; of that $153 million, $7.5 million was to be used to pay contract support costs for new or expanded contracts. H.R. Rep. No. 173, *supra*, at 95, 97. In the appropriations act itself, Congress segregated the $7.5 million from the lump-sum Indian Health Services appropriation for a separate Indian Self-Determination Fund, which was to "remain available" for new or expanded contracts "until expended." Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-189.

Similarly, for fiscal year 1997, Congress appropriated a lump-sum of approximately $1.8 billion to IHS for Indian Health Services. The committee report earmarked $160,660,000 for contract support costs. S. Rep. No. 319, *supra*, at 90. Of that $160,660,000, Congress again set aside $7.5 million in the Indian Self-Determination Fund to fund contract support costs for new or expanded contracts. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-212 to 3009-213. Finally, for fiscal year 1998, Congress enacted a statutory cap on contract support costs. Act of Nov. 14, 1997, Pub. L. No. 105-83, 111 Stat. 1583 (sum "not to exceed $168,702,000 shall be for payments to tribes * * * for [contract support costs] associated with ongoing contracts or grants or compacts entered into with the [IHS] prior to fiscal year 1998, as authorized by the Indian Self-Determination Act of 1975, as amended").

b. Petitioner Shoshone entered into a Compact of Self-Governance and an associated Annual Funding Agreement with the Secretary in 1994. Pet. C.A. App. 293, 330.[2] Shoshone's Annual Funding Agreement for the 1996 fiscal year included a clause stating that "[t]he parties to this Agreement recognize that the total amount of the funding in this Agreement is subject to adjustment due to Congressional action in appropriations Acts or other laws affecting availability of funds to the Indian Health Service." *Id.* at 342. "Upon enactment of any such Act or law," the agreement specified, "the amount of funding provided to the Tribes in this Agreement shall be adjusted as necessary." *Ibid.* Shoshone's Annual Funding Agreement for fiscal year 1997 similarly acknowledged that "[t]he parties to this Agreement recognize that the total amount of the funding in this Agreement is subject to the availability of appropriations." *Id.* at 374.

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[2] Petitioners are parties to compacts with IHS. However, because self-governance compacts and self-determination contracts are both subject to the same congressional appropriation mechanism, 25 U.S.C. 450j-1(b), 458aaa-7(c), the terms "contract" and "compact" have been used interchangeably throughout this litigation.

Shoshone's fiscal year 1996 Annual Funding Agreement also stated that it was governed by Indian Self-Determination Memorandum 92-2 (ISDM 92-2), which set forth IHS's policy for allocating new contract support costs in accordance with a priority list, or queue. IHS developed the contract-support-cost allocation policy embodied in ISDM 92-2 in consultation with tribal contractors to address chronic congressional underfunding of contract support costs for new or expanded ISDA contracts. Pet. C.A. App. 209, 536-537. Under the policy, approved contract-support-cost requests for new or expanded self-determination contracts were 100% funded on a first-come, first-served basis, as determined by the date on which IHS received the Tribe's request. *Id.* at 340-341, 536.[3]

Accordingly, when Shoshone submitted a request for contract support costs in connection with newly acquired health care programs for fiscal years 1996 and 1997, the requests were placed in the Indian Self-Determination queue. Pet. C.A. App. 241, 537. Those requests, however, did not reach the top of the queue. As a result, Shoshone did not receive any additional funding for contract support costs for those new

[3] Once funds were exhausted, Tribes awaiting new contract-support-cost funding on the priority list would be provided new contract-support-cost funds according to the date of the individual request, if additional appropriations were made available. In any year in which a Tribe reached the top of the queue, it would be paid its new contract support costs for that year and would continue to be paid at least that amount of contract support costs for the newly funded program every year thereafter. Pet. C.A. App. 536. In fiscal year 1999, Congress eliminated the Indian Self-Determination Fund from the Indian Health Services appropriation, and IHS has changed its contract-support-cost distribution methodology accordingly.

programs in either year. Instead, in each of those years, IHS allotted the $7.5 million from the Indian Self-Determination Fund to Tribes that were ahead of Shoshone in the queue. *Id.* at 537; Pet. App. 48a.

c. Petitioner Cherokee operates various IHS-funded health care programs for the benefit of its tribal members under self-determination contracts. For fiscal year 1994, Cherokee entered into a Compact of Self-Governance and associated Annual Funding Agreement with IHS, which covered new and pre-existing programs. Pet. C.A. App. 422. Section 3 of the Compact signed by Cherokee, under the heading "Funding Amount," expressly stated that the Secretary's provision of funds to the Tribe under the Annual Funding Agreement would be "[s]ubject only to the appropriation of funds by the Congress of the United States"; "the use of any and all funds under this Compact," it further stated, "shall be subject to specific directives or limitations as may be included in applicable appropriations acts." *Id.* at 425. Cherokee's Annual Funding Agreement for the 1997 fiscal year similarly acknowledged those limits. "The parties agree that adjustments may be appropriate due to unanticipated Congressional action." *Id.* at 450.

Like petitioner Shoshone, petitioner Cherokee submitted a request for contract support costs for new programs for fiscal year 1997. Like Shoshone's requests, Cherokee's request was placed in the Indian Self-Determination queue, because sufficient congressional appropriations were not available at the time the request was made. Pet. C.A. App. 234, 235, 537. In particular, IHS had already allocated $7.5 million for new contract support costs to Tribes ahead of Cherokee in the queue. Because Cherokee never reached the top of the queue, Cherokee did not receive any additional

funding for contract support costs for its new programs in the 1997 fiscal year. *Id.* at 537; Pet. App. 48a.

3. Petitioners brought this action in district court against the Secretary and the United States, claiming that the ISDA and their contracts entitled them to full payment of all contract support costs.[4] They sought "money damages," as well as a declaratory ruling that Section 314 (discussed pp. 3-4, *supra*) had no application in the case.

On cross-motions for summary judgment, the district court ruled in favor of the government. Pet. App. 24a-50a. The court held that petitioners' ISDA contracts were expressly conditioned on IHS having sufficient funding. *Id.* at 44a-45a. The court found that, because all of the $7.5 million appropriated by Congress for contract support costs for new contracts in fiscal years 1996 and 1997 had been allocated to other Tribes before IHS reached petitioners' requests, petitioners were not entitled to payment. Neither the ISDA nor petitioners' contracts, the court held, obligated IHS to pay contract support costs in excess of appropriated funds. *Id.* at 46a, 48a.

The district court also reasoned that IHS could not use any of its annual lump-sum appropriations to pay

[4] Before filing this lawsuit, petitioners submitted individual claims to the agency pursuant to the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.* When the claims were not decided within the statutory time period, petitioners elected to treat their claims as denied and jointly filed this action in district court. See 25 U.S.C. 450m-1(a); 41 U.S.C. 605(c)(5). The complaint was brought on behalf of petitioners and a putative class of similarly situated Tribes. The district court denied class certification, *Cherokee Nation* v. *United States*, 199 F.R.D. 357 (E.D. Okla. 2001), and petitioners neither challenged that ruling on appeal nor challenge it in this Court.

petitioners' contract support costs "without impairing its ability to discharge its responsibilities with respect to other tribes and individual Indians," which "could severely impair various Indian programs." Pet. App. 46a. The court held that the ISDA itself—and 25 U.S.C. 306, 450f, and 450j-1(b) in particular—provides that the Secretary need not reallocate funds from other tribal programs to pay contract support costs. Pet. App. 46a.

Finally, the court concluded that Section 314, by its plain text, capped the amount that IHS could spend on contract support costs for contracts during the relevant fiscal years. In particular, Section 314 limited contract-support-cost payments to the amounts earmarked in appropriation committee reports for that purpose. Because those sums had already been expended, the court held, petitioners were not entitled to payment. Pet. App. 47a.

4. a. The court of appeals affirmed. Pet. App. 1a-23a. The court first rejected petitioners' claim that they had a statutory right to full payment for contract support costs for ongoing programs, holding that the phrase "subject to the availability of appropriations" in Section 450j-1(b) is "'clear and unambiguous.'" *Id.* at 12a (quoting *Babbitt* v. *Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374, 1378 (Fed. Cir. 1999), cert. denied, 530 U.S. 1203 (2000)). "By means of this express language," the court explained, "Congress has plainly excluded the possibility of construing the contract support costs provision as an entitlement that exists independently of whether Congress appropriates money to cover it." *Ibid.* (quoting *Shoshone-Bannock Tribes* v. *Secretary, Dep't of HHS*, 279 F.3d 660, 665 (9th Cir. 2002)). The court observed that, by virtue of that language and similar provisions in petitioners' annual funding agree-

ments, IHS's decision not to spend sums beyond those appropriated violated neither the statute nor the contracts. *Id.* at 13a. That conclusion, the court of appeals noted, was consistent with the decisions of three other circuits. *Id.* at 12a-13a (citing *Oglala*, 194 F.3d at 1378; *Shoshone-Bannock*, 279 F.3d at 665; *Ramah Navajo Sch. Bd.* v. *Babbitt*, 87 F.3d 1338, 1345 (D. C. Cir. 1996)).

The court of appeals also explained that, under the ISDA, "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe." Pet. App. 12a. The Secretary thus "need not take money intended to serve non-[contract support cost] purposes under the ISDA in order to meet his responsibility to allocate" contract support costs. *Id.* at 13a. Because Congress had not appropriated sufficient funds to pay petitioners' contract support costs in full without cutting into IHS's funding of other programs, *id.* at 15a, the court held that IHS was not required to pay petitioners' contract support costs, *id.* at 16a-17a.

The court of appeals also rejected petitioners' claim that, with respect to ongoing contracts, petitioners had an "entitlement" to full contract-support-cost funding that "vested immediately, at the beginning of each fiscal year, and, presumably, ahead of other IHS obligations." Pet. App. 15a-16a. Petitioners, the court pointed out, failed to "provide support for that assertion." *Id.* at 16a. "[N]or would that make sense, given the structure of the compacts plaintiffs have with the government, as well as the IHS' numerous other mandatory financial obligations." *Ibid.* Finally, the court of appeals agreed with the district court that IHS had "demonstrated" that paying petitioners' contract support costs "for ongoing contracts would have necessitated a reduction in funding for other tribal programs."

Id. at 15a. The court further held that IHS's allocation of its lump-sum appropriation in accordance with congressional committee report recommendations was a reasonable "exercise of the limited discretion inevitably vested in it." *Id.* at 16a (citation omitted).

b. The court of appeals then turned to the Tribes' argument that they were entitled to contract-support-cost funding for new or expanded programs. The court, relying on the language of the 1996 and 1997 appropriations acts, the House Appropriations Committee reports, and the Ninth Circuit's decision in *Shoshone-Bannock*, held that "Congress intended to limit the amount [of contract support costs] available for new or expanded [contracts] to $7.5 million." Pet. App. 19a-20a. Here, all of the $7.5 million appropriated by Congress for contract support costs for new contracts in fiscal years 1996 and 1997 had been allocated to other Tribes before IHS reached petitioners' requests in the queue. *Id.* at 20a. Accordingly, the court of appeals held that IHS was not obligated to pay contract support costs beyond that sum. *Id.* at 17a, 20a.

Finally, the court of appeals "agree[d] with the district court that § 314 supports [the] conclusion that Congress intended to make available for CSCs for new or expanded contracts in fiscal years 1996 and 1997 *only* $7.5 million." Pet. App. 21a. Through that provision, the court explained, "Congress indisputably indicated [that] no more funds would be available to pay CSCs for those years, and it made it very clear that that is what it intended to appropriate for those years." *Ibid.* While the appropriations committee reports were not by themselves necessarily binding on the agency, the court observed, Section 314 unequivocally "indicated that the earmarked amounts in the committee reports for

ongoing CSCs were intended to be legally binding." *Ibid.*

The court of appeals also rejected petitioners' argument that they had a contractual right to full contract-support-cost funding. Pet. App. 21a-22a. "[B]ecause any contract claim was conditioned on, and subject to, available appropriations," the court held, the agency's decision not to make payments in the face of appropriations shortfalls was permissible. *Id.* at 21a. For that reason, the court of appeals also rejected petitioners' reliance on *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996), and *New York Airways, Inc.* v. *United States*, 369 F.2d 743 (Ct. Cl. 1966). "[I]t was always clear and explicit, both in the ISDA and in the contracts with the government, that the funding was subject to available appropriations and, despite [petitioners'] repeated assertions to the contrary, there were, in fact, insufficient appropriations to permit full funding." Pet. App. 22a-23a & n.11.

ARGUMENT

Petitioners contend that the ISDA and their self-determination contracts require full payment of their contract support costs—despite express provisions making payment of such costs contingent on the availability of appropriated funds, despite an express provision stating that the Secretary need not reduce funding for other tribal programs to pay such costs, and despite Congress's failure to appropriate sufficient funds for the payment of such costs. The court of appeals correctly rejected petitioners' arguments, and its decision does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is unwarranted.

1. Section 450j-1(b) states that, "[n]otwithstanding any other provision" of the ISDA regarding contract funding, "the provision of funds under this subchapter is subject to the availability of appropriations." 25 U.S.C. 450j-1(b). The court of appeals correctly concluded that Section 450j-1(b) unambiguously conditions petitioners' right to payment on the availability of appropriations. See Pet. App. 12a-13a. The other courts of appeals that have considered the issue have unanimously agreed. See *Shoshone-Bannock Tribes* v. *Secretary, Dep't of HHS*, 279 F.3d 660, 664-665 (9th Cir. 2002) ("Because of the express language subjecting provision of [ISDA] funds to 'availability of appropriations,' and the clear statement that this limitation applies 'notwithstanding any other provision in this Act,' Congress has plainly excluded the possibility of construing the [contract support cost] provision as an entitlement that exists independently of whether Congress appropriates money to cover it.") (footnotes omitted); *Babbitt* v. *Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374, 1378 (Fed. Cir. 1999) ("The language of § 450j-1(b) is clear and unambiguous; any funds provided under an ISDA contract are 'subject to the availability of appropriations'"; thus, "in the face of congressional under-funding, an agency can only spend as much money as has been appropriated for a particular program."), cert. denied, 530 U.S. 1203 (2000); *Ramah Navajo Sch. Bd.* v. *Babbitt*, 87 F.3d 1338, 1345 (D.C. Cir. 1996) ("[I]f the money is not available, it need not be provided, despite a Tribe's claim that the ISDA 'entitles' it to the funds.").

That construction is supported by elementary canons of statutory construction. "When," as here, "the words of a statute are unambiguous, then * * * 'judicial inquiry is complete.'" *Connecticut Nat'l Bank* v. *Ger-*

main, 503 U.S. 249, 254 (1992) (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981)). It is supported, moreover, by the ISDA's structure. Section 450j-1(a), entitled "Amount of funds provided," establishes the general requirement that the Secretary pay contract support costs. Section 450j-1(b), entitled "Reductions and increases in amount of funds provided," immediately follows Section 450j-1(a). By virtue of its title and placement alike, Section 450j-1(b) is most naturally understood to set forth the conditions under which the Secretary may pay less (or more) than the amount otherwise provided by Section 450j-1(a). See *Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998).

The ISDA reinforces those limits through the concluding clause of Section 450j-1(b), which states that "the Secretary is *not required* to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter." 25 U.S.C. 450j-1(b) (emphasis added). That provision makes it clear that, if paying contract support costs (or other self-determination contract costs) would require the Secretary to reduce funding for other IHS initiatives serving non-contracting (or other) Tribes, contracting Tribes are not entitled to full payment. In this case, "there were simply insufficient appropriations to pay the contract support costs requested by plaintiffs." Pet. App. 46a. As a result, any effort by IHS to use "any of its annual appropriations to pay" those costs would have "impair[ed] its ability to discharge its responsibilities with respect to other tribes and individual Indians," severely "impair[ing] various Indian programs," as the district court and court of appeals both found. *Ibid.* (district court); *id.* at 15a (court of appeals) (government "demonstrated that providing [petitioners] their entire CSCs for ongoing

contracts would have necessitated a reduction in funding for other tribal programs"). In such circumstances, the Secretary was not required to "reduc[e] funding for" other programs "to make funds available" for "self-determination contracts." *Id.* at 46a.[5]

2. Petitioners nonetheless argue that the court of appeals misconstrued Section 450j-1(b). According to petitioners (Pet. 11, 15-16), they had a "vested" contractual right to immediate and full payment of their contract support costs when Congress appropriated money to IHS. They argue that, because (in their view) sufficient funds to pay those costs were "legally available" from IHS's lump-sum appropriation the instant the appropriation was made, IHS was obligated to pay

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[5] Relying on isolated Presidential budget reports, petitioners (Pet. 7, 16 n.13) appear to challenge the district court's and court of appeals' determination that appropriated funds were insufficient. This Court ordinarily does not grant review to resolve fact-based disputes, much less to review the "concurrent findings of fact by two courts below." See *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987) (quoting *Grave Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949)); see also *United States* v. *Doe*, 465 U.S. 605, 614 (1984). Petitioners, moreover, forfeited any arguments based on those budget reports by failing to present them to the district court. See Gov't C.A. Br. 48 n.21. In any event, the reports raise no material issue of fact, because the reports do not indicate that the allegedly unspent sums were general purpose funds that could be reprogrammed to new purposes, such as contract support costs. To the contrary, unspent funds are often specialized funds (such as the proceeds of reimbursements) that can be used only for particular purposes. Here, the government offered undisputed evidence that the annual appropriations were insufficient to pay contract support costs without "us[ing] money otherwise dedicated to other purposes supporting health services delivery to the tribes." Pet. App. 14a; see *id.* at 15a. Petitioners' belated citation to the budget reports does not create a genuine issue of material fact, and certainly does not warrant this Court's review.

those costs (ahead of other priorities) notwithstanding Section 450j-1(b). Pet. 15.

a. Petitioners provide no sensible reason why Section 450j-1(b) should be interpreted in that distorted, chop-logic fashion. Although the ISDA requires that contract support costs "shall be added to" the amount of direct program funding a Tribe receives, 25 U.S.C. 450j-1(a)(2), the Act also makes clear that—"[n]otwithstanding any other provision" in the Act—the Secretary's obligation to fund self-determination contracts, including contract support costs, "is subject to the availability of appropriations." 25 U.S.C. 450j-1(b). The Act nowhere suggests that "availability" means *theoretical* or *legal* availability, the hypothetical moment after Congress enacts an appropriation, rather than practical availability. To the contrary, "availability" should be read in a realistic fashion in view of competing claims and priorities. Indeed, the Act confirms that construction, specifying that "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization" for self-determination contracts. *Ibid.*; see *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455, 1456 (10th Cir. 1997) (the Secretary must "continue to provide direct services to a tribe until such time as the tribe chooses to enter into a 'self-determination contract'").

In essence, petitioners argue that the Secretary—faced with the limitations of a finite appropriation and competing claims for funding—was obligated to pay their claims ahead of all other priorities because, at the moment Congress made the appropriation, the appropriation exceeded the amount of their claims. That contention, however, turns Section 450j-1(b) on its head. Under that construction, the Secretary must pay

indirect and other contract support costs first and use only the residue to furnish the core funding for all other programs. But Section 450j-1(b) unmistakably provides for the opposite result, declaring that the Secretary need not reduce funding for other programs to finance self-determination contracts. The court of appeals thus did not err in rejecting petitioners' claim that, despite Section 450j-1(b), the Secretary was required to "rob Peter to pay Paul"—or rob other Tribes of needed programs to pay petitioners' contract support costs. Instead, Section 450j-1(b) was clearly designed to foreclose that result.

b. Contrary to petitioners' assertions (Pet. 15-19), the court of appeals' reading of Section 450j-1(b) does not conflict with *Blackhawk Heating & Plumbing Co.* v. *United States*, 622 F.2d 539 (Ct. Cl. 1980). In *Blackhawk*, the former Court of Claims held that the right to payment under a government procurement contract settlement agreement, although conditioned on the availability of appropriations, nonetheless became a vested right at the time a payment fell due, because "appropriated funds were available" at that time. *Id.* at 553. Relying on dictum in a footnote in the *Blackhawk* opinion, petitioners contend that it is irrelevant whether the Secretary would have had to reprogram funds from other priorities to pay contract support costs. Pet. 15 (quoting *Blackhawk*, 622 F.2d at 552 n.9).

There are three problems with that contention. First, unlike 25 U.S.C. 450j-1(b), neither the contract nor the statute at issue in *Blackhawk* included a provision declaring that the agency would *not* be required to reprogram funds in order to make contract payments. In contrast, the ISDA does. "Notwithstanding any other provision in this subchapter," Section 450j-1(b) declares, "the Secretary is *not* required to reduce

funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter." 25 U.S.C. 450j-1(b) (emphasis added). Because there was no such provision in *Blackhawk*, the Court of Claims had no reason to consider its effect.

Second, *Blackhawk* concerned the interpretation of a procurement contract. Congress has made it clear that ISDA contracts are not procurement contracts. 25 U.S.C. 450b(j), 450j(a). Instead, they are government-to-government funding arrangements. Compare *Bowen* v. *Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 51-56 (1986). Section 450j-1(b), moreover, is a reflection of the fundamentally different nature of government-to-government agreements like ISDA self-determination contracts. Under those agreements, the Tribe is substituted for a federal agency in furnishing governmental services. Just as a federal agency administering those programs directly would be constrained by the availability of appropriations and the allocation of funds among its programs, Congress made sure that the same principle would apply when Tribes provided the same services pursuant to self-determination agreements. That is, Congress provided that Tribes choosing to administer programs in place of a federal agency would be subject to the same funding limitations the federal agency would face if it continued to administer those programs itself.

Third, to the extent *Blackhawk* is relevant here, it supports the Secretary's position. *Blackhawk* specifically recognized that Congress can condition "the Government's liability * * * upon the continuing availability of appropriated funds *to the agency*. The risk perceived in this contingency having come about, the Government's liability, by the terms of the agreement,"

can be "thereby extinguished." 622 F.2d at 553. Here, the ISDA and petitioners' contracts placed the risk of insufficient appropriations not on the government but on the Tribes. See pp. 5-7, *supra*. Petitioners willingly accepted that risk. The "contingency having come about," however, they now seek to evade both the terms of their agreements and the unambiguous text of Section 450j-1(b).

For the same reasons, petitioners' reliance on *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996), is misplaced. In *Winstar*, the plurality accepted the contention that "the Government assumed the risk that subsequent changes in the law might prevent it from performing, and agreed to pay damages in the event that such failure to perform caused financial injury." 518 U.S. at 871 (plurality opinion). The relevant statute there, 12 U.S.C. 1729(f)(2) (1988), moreover, authorized the Federal Savings and Loan Insurance Corporation "to guarantee [acquiring thrifts] against loss" that might occur as a result of a supervisory merger. 518 U.S. at 883. Here, in contrast, both the ISDA itself and the funding agreements under it anticipated the possibility of insufficient appropriations, and they placed the risk of insufficiency *on petitioners*. Funding for the services, they provide, is conditioned on the availability of appropriations (just as it would be if the federal agency continued to provide those services itself). See pp. 3, 5-7, 13-15, *supra*. Furthermore, nothing in the ISDA or the funding agreements purports to make the government liable in damages in the event of an appropriations shortfall. Indeed, any such provision would make Section 450j-1(b) and the limits on funding obligations it establishes a virtual nullity.

c. Nor is there any merit to petitioners' argument (Pet. 17-19) that the decision below is inconsistent with

cases holding that appropriation committee recommendations regarding the allocation of lump-sum appropriations are not binding law. See *e.g.*, *Lincoln* v. *Vigil*, 508 U.S. 182, 192 (1993); *Blackhawk*, 622 F.2d at 547 n.6. The decision below nowhere held that the committee report earmarks were binding on the agency. Rather, the court of appeals observed that, "while the Tribes correctly argue that the earmark recommendations of a committee are not typically legally binding, the IHS is likewise not obligated to completely ignore them." Pet. App. 16a (footnote omitted). The court of appeals reasoned that the agency's decision to follow the allocation plan recommended in the committee reports was a reasonable "exercise of the limited discretion inevitably vested in it." *Ibid.* Indeed, as this Court has explained, it can be unwise for an agency to ignore such recommendations, because "an agency's decision to ignore congressional expectations may expose it to grave political consequences." *Lincoln*, 508 U.S. at 193.

In this case, in any event, Congress made its intent to establish binding limits on contract-support-cost payments clear by enacting Section 314 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681-288. Section 314 specifies that, "[n]otwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports * * * for contract support costs associated with self-determination or self-governance contracts * * * *are the total amounts available for fiscal years 1994 through 1998 for such purposes.*" § 314, 112 Stat. 2681-288 (emphasis added). The court of appeals properly construed that provision as a binding command:

> Whether we view this as a retroactive law, or as merely a clarification of the prior Appropriations Acts, Congress could not have been clearer as to its intent * * * that "the amounts appropriated to or earmarked in committee reports . . . are the total amounts available." Thus, Congress indisputably indicated no more funds would be available to pay CSCs for those years, and it made it very clear that that is what it intended to appropriate for those years.

Pet. App. 21a.

The only other court of appeals to have construed Section 314 reached the same conclusion. See *Shoshone-Bannock*, 279 F.3d at 668. In that case too, a Tribe sought additional contract-support-cost funding associated with new programs for fiscal year 1996. The Ninth Circuit concluded that Section 314 retroactively cured any ambiguity in whether the IHS could "limit its expenditures on contract support costs to the $7.5 million" earmarked in the committee report, or instead had "to use whatever it takes of its entire $1.7 billion appropriation." 279 F.3d at 667, 668. In so holding, the Ninth Circuit found that Section 314 represents "'the clear expression of congressional intent'" necessary to establish retroactive legislation. *Id.* at 668 (quoting *United States* v. *Larionoff*, 431 U.S. 864, 879 (1977)).

3. Perhaps recognizing that Section 314 is, by itself, fatal to their claims, petitioners challenge the court of appeals' construction of that provision as well. The "conclusion that Congress can enact retroactive legislation that alters pre-existing law and contract terms in the guise of a 'clarification,'" petitioners argue, "is directly at odds with the law of other Circuits and this Court." Pet. 19.

That contention, too, lacks merit. To begin with, the only other court of appeals that has addressed the meaning of Section 314 read it in precisely the same fashion as the decision below. See p. 21, *supra* (discussing *Shoshone-Bannock*). That construction, moreover, is consistent with the precedent cited by petitioners (Pet. 21-22), such as *Piamba Cortes* v. *American Airlines, Inc.*, 177 F.3d 1272 (11th Cir. 1999). In *Piamba Cortes*, the Eleventh Circuit opined that "[a] significant factor [in determining whether an amendment clarifies prior law] is whether a conflict or ambiguity existed with respect to the interpretation of the relevant provision when the amendment was enacted. If such an ambiguity existed, courts view this as an indication that a subsequent amendment is intended to clarify, rather than change, the existing law." *Id.* at 1283-1284. As petitioners note (Pet. 14 n.9), Section 314 was enacted in the wake of litigation concerning whether the government could be held liable for the full amount of contract support costs requested for new or expanded programs. See S. Rep. No. 227, 105th Cong., 2d Sess. 52 (1998). Thus, even under the authority relied on by petitioners, the Tenth Circuit's reading of Section 314 as a clarification of the earlier appropriations acts is correct.[6] Whether or not Section 314 is properly characterized as a "clarification" or a "change" in law, moreover, is a highly case-specific question.

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[6] Nor does *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), require a different outcome. In *Red Lion*, this Court held that Congress "ratified" the administrative construction of a statute "with positive legislation." *Id.* at 381-382. Section 314 similarly confirms the correctness of—it ratifies—the Secretary's decision to allocate funds for contract support costs in accordance with the committee report earmarks.

Petitioners' argument also seems to rest on the erroneous premise that Section 314 is impermissible because it abrogates "vested" rights. Pet. 19; see Pet. 21 ("retroactive change impacting vested rights"). Even before Section 314's enactment, however, petitioners never had an absolute right to full funding of their contract support costs. See pp. 15-17, *supra*. Instead, as the court of appeals correctly observed, "[i]t was always clear and explicit, both in the ISDA and in [petitioners'] contracts with the government, that the funding was subject to available appropriations," and that the agency would not be required to reprogram funds from other programs to make up for shortfalls. Pet. App. 22a-23a n.11. Nothing in the statute or petitioners' contracts specifies that Congress cannot affect the sums appropriated for one year through laws enacted in later years. In any event, petitioners received everything to which their contracts entitled them—payment for contract support costs *subject to* the availability of appropriations.[7]

4. Finally, we note a potential jurisdictional barrier. Petitioners' claims for additional payment from IHS

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[7] Petitioners engage in hyperbole when they suggest that the decision below represents an "unprecedented expansion" of Congress's powers, Pet. 19, that "eviscerate[s]" the "whole concept of a government contract obligation * * * with disturbing consequences for thousands of federal contractors," Pet. 11-12. In fact, this case concerns the proper construction of the particular language of 25 U.S.C. 450j-1(b)—including its declaration that the Secretary need not decrease funding for other programs to pay self-determination contract costs—and corresponding provisions of petitioners' self-determination contracts. See p. 18, *supra* (discussing distinct nature of government-to-government agreements). Petitioners cite no case outside the context of Indian self-determination contracts that involves similar language or limits on payment obligations.

appropriations in the relevant fiscal years are likely moot, because the lump-sum appropriations for those years were "one-year" appropriations that have now lapsed. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 304, 110 Stat. 1321-196 ("No part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein."); Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 304, 110 Stat. 3009-220 (1996) (same); see 31 U.S.C. 1301(c)(2) (an annual appropriation generally may not be construed to be available beyond the specific year of the appropriation unless the appropriation "expressly provides that it is available after the fiscal year covered by the law in which it appears").[8]

Petitioners' complaint in this case was not filed in district court until March 1999 (Pet. C.A. App. 4), well after the close of both fiscal years at issue. Where, as here, "budget authority has lapsed before suit is brought, there is no underlying congressional authorization * * *. It has vanished, and any order of the court to obligate public money conflicts with the constitutional provision vesting sole power to make such authorizations in the Congress." *National Ass'n of Reg'l Councils* v. *Costle*, 564 F.2d 583, 588-589 (D.C. Cir. 1977); see U.S. Const., Art. I, § 9, Cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."); see *OPM* v. *Richmond*, 496 U.S. 414, 424 (1990); see also *City of Houston* v. *HUD*, 24 F.3d 1421, 1428 (D.C. Cir. 1994) (where "the

[8] Although this argument was not raised earlier, mootness is jurisdictional and may be raised at any time. *Calderon* v. *Moore*, 518 U.S. 149 (1996).

relevant appropriation has lapsed or been fully obligated * * * the federal courts are without authority to provide monetary relief"). Congress, moreover, has barred the payment of such costs through Section 314, which provides that, "[n]otwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports * * * for contract support costs * * * are the total amounts available * * * for such purposes." § 314, 112 Stat. 2681-288. Because petitioners cannot obtain the relief they seek, their claims are moot.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] Petitioners appear to rely (Pet. 16-17 n.13) on the judgment fund, 31 U.S.C. 1304. But the "general appropriation for payment of judgments * * * does not create an all-purpose fund for judicial disbursement." *OPM* v. *Richmond*, 496 U.S. 414, 432 (1990). Here, moreover, Congress has declared that, "[n]otwithstanding any other provision of law," the amounts earmarked in the committee reports are "the total amounts available" for "contract support costs" for the relevant years. § 314, 112 Stat. 2681-288. The federal courts may not circumvent that limit on contract support costs by directing payment pursuant to the provisions of law establishing the judgment fund.